No. 87-1136

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

AMERICAN COMMERCIAL LINES, INC., MAC TOWING, INC., and M/V "ROBERT GREENE," - - - Petitioners,

versus

GEORGE and RUTH DAVIS, - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BROWN, TODD & HEYBURN
JOHN R. McCALL
1600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5400
Counsel of Record

BROWN, TODD & HEYBURN
DAVID TACHAU
SCOTT T. DICKENS
1600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5400
Counsel for Petitioners

December 31, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

BEST AVAILABLE COPY

55 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Does special judicial treatment of seamen as "wards of admiralty" deprive employers of injured seamen equal protection of the laws because they alone must prove the validity of settlement releases?

2. Does a court of appeals, in effectively requiring every settled maritime claim to be litigated through a "friendly suit," violate the Fifth Amendment because that action bears no "rational relationship" to a "legitimate state purpose"?

3. Did the U. S. Court of Appeals for the Sixth Circuit improperly apply Fed. R. Civ. P. 56 in reversing the district court's award of summary judgment where there was no evidence on which a jury could reasonably find for the respondents?

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS (Rule 28.1)

American Commercial Lines, Inc., as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The parties to the proceedings below were the petitioners American Commercial Lines, Inc.; Mac Towing, Inc.; and M/V "ROBERT GREENE;" and the respondents George and Ruth Davis.

The parent company of petitioner American Commercial Lines, Inc. is CSX Corporation.

Dated: December 31, 1987

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES and RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	iv– v
OPINIONS BELOW	1– 2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3– 9
I. Statement Of The Issue	4
II. Statement Of The Facts	4–10
REASONS FOR GRANTING THE WRIT	11–23
I. Summary	11–12
II. No "Legitimate State Interest" Is Served By Giving Seamen's Releases Stricter Judicial Scrutiny Than Releases Executed By Other American Workers	12–13
A. The "Wards of Admiralty" Doctrine Belongs to a Bygone Era	13–17
B. There Is No Modern Justification for Impairing the Presumptive Validity of a Worker's Release Simply Because the Worker Qualifies as a Seaman Under the Jones Act	17–20
III. Even If The State Does Have A Legitimate Interest In Giving Special Protection To Seamen, There Is No "Rational Relationship" Between That Interest and Requiring "Friendly Suits" To Be Instituted To Resolve Seamen's Claims	20–23
CONCLUSION	24–25
APPENDIX — (Order denying rehearing or rehearing en banc, Opinion of the Court of Appeals, Judgment of the District Court, and Magistrate's Report and Recommendation)	1a

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. *Liberty Lobby, Inc.*, 477 U. S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 7

Bass v. *Phoenix Seadrill/78, Ltd.*, 749 F. 2d 1154 (5th Cir. 1985) 11, 20, 21

Bolling v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) 12

Borne v. *A & P Boat Rentals No. 4, Inc.*, 780 F. 2d 1254 (5th Cir. 1986) 20

Callen v. *Pennsylvania Railroad Co.*, 332 U. S. 625, 68 S. Ct. 296, 92 L. Ed. 242 (1948) 3, 10, 21, 22

City of Cleburne, Texas v. *Cleburne Living Center*, 473 U. S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) 10, 12, 16, 19

The David Pratt, 7 F. Cas. 22 (D. Me. 1839) (No. 3597) 14

Garrett v. *Moore-McCormack*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) 3, 5, 7, 12, 17

Harden v. *Gordon*, 11 F. Cas. 480 (C.D. Me. 1823) (No. 6047) 12

Hume v. *Moore-McCormack Lines, Inc.*, 121 F. 2d 336 (2d Cir.), *cert. denied*, 314 U. S. 684 (1941). 13

Lampsis Navigation Ltd. v. *Ortiz De Cortes*, 694 F. 2d 934 (2d Cir. 1982) 18

Matsushita Electric Industrial Co., Ltd. v. *Zenith Radio Corp.*, 475 U. S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 7

Metropolitan Life Insurance Co. v. *Ward*, 470 U. S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985) 10, 18

Osland v. *Star Fish & Oyster Co.*, 107 F. 2d 113 (5th Cir. 1939) 18

Plessy v. *Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) 16

Robertson v. *Baldwin*, 165 U. S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897) 14, 15, 17, 23

PAGE

The S.S. Standard, 103 F. 2d 437 (2d Cir.), *cert. denied*, 308 U. S. 560 (1939) 21

Weinberger v. *Wiesenfeld*, 420 U. S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975) 12

Wink v. *Rowan Drilling Co.*, 611 F. 2d 98 (5th Cir.), *cert. denied*, 449 U. S. 823 (1980) 21

Miscellaneous:

M. Norris, 1 *The Law of Seamen* 11, 18

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

AMERICAN COMMERCIAL LINES, INC., MAC TOWING, INC., and M/V "ROBERT GREENE," - - - *Petitioners,*

v.

GEORGE & RUTH DAVIS, - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners American Commercial Lines, Inc., et al., respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in these proceedings on July 24, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 823 F. 2d 1006, and is reprinted in the appendix, p. 2a, *infra.*

The Judgment of the United States District Court of the Eastern District of Kentucky (Bertelsman, D. J.) has not been reported. It and the Magistrate's

Report and Recommendation (Hood, M.) are reprinted in the appendix at p. 8a and p. 10a, *infra*.

JURISDICTION

The respondents brought this suit on November 18, 1985, in the Eastern District of Kentucky, invoking federal jurisdiction under the Jones Act, 46 U.S.C. § 688, and the general maritime laws of the United States.

On May 22, 1986, the district court dismissed the suit on petitioners' motion for summary judgment. See p. 8a, *infra*.

On respondents' appeals, the Sixth Circuit on July 24, 1987, reversed the district court's judgment and remanded the lawsuit for further proceedings. See p. 2a, *infra*. Petitioners sought a rehearing and suggested a rehearing en banc, but these were denied by the Sixth Circuit on October 5, 1987. See p. 1a, *infra*.

The jurisdiction of this Court to review the decision of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution Amendment V provides, in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law[.]"

46 U.S.C. § 688(a) provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his elec-

> tion, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Rule 9.9a of the General Rules of the United States District Court for the Eastern District of Louisiana provides:

> Seaman Settlements
>
> a. The Court will not enter a judgment based upon a joint stipulation and compromise which has been agreed upon by the parties prior to the filing of a complaint.

STATEMENT OF THE CASE

I. Statement Of The Issue

This petition involves the issue of whether the American judiciary's unusual treatment of seamen as "wards of admiralty" violates modern equal protection principles. The issue arises because the Sixth Circuit relied upon the "wards of admiralty" doctrine to reinstate a seaman's lawsuit against his employer. In doing so, the Sixth Circuit revived a direct conflict between the treatment of seamen's releases under the Jones Act, 46 U.S.C. § 688, as contrasted with the treatment of all other workers' releases under federal law. *Compare Garrett* v. *Moore-McCormack,* 317 U. S. 239, 246-48, 63 S. Ct. 246, 251-52, 87 L. Ed. 239, 244-45 (1942) ("the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion"), *with, Callen* v. *Pennsylvania Railroad Co.,* 332 U.S. 625, 630, 68 S. Ct. 296, 298, 92 L. Ed. 242, 246 (1948) ("the releases of railroad employees" claiming under the Federal Employers' Liability Act, 45 U.S.C. § 51, "stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity").

II. Statement Of Facts

On November 2, 1983, George Davis suffered a serious wrist sprain while working as a deckhand aboard a towboat owned by his employer, Mac Towing,

and its corporate parent, American Commercial Lines, Inc. Mac Towing paid $3,556 in maintenance and cure until July 12, 1984, when it received notice from Davis's doctor that Davis had reached maximum cure. Thereafter, as the Sixth Circuit summarized:

> Defendants later offered Davis and his wife $7,500 in return for their release of all claims that they might have, and, on August 8, 1984, the Davises, unaccompanied by counsel, went to the law officies of defendants' attorney for the purpose of executing a settlement and release. At the settlement conference, the attorney asked the Davises a series of questions, which addressed aspects of Davis' employment, his injury, his claim against defendants, and the terms of the release and settlement. During the course of the settlement conference, plaintiffs said they did not desire to have an attorney present to represent them, and they executed a release agreement in exchange for payment of $7,500.

See p. 3a, *infra*.

Despite their releases, on November 18, 1985, the Davises filed suit in the Eastern District of Kentucky against Mac Towing, American Commercial Lines, Inc., and the vessel he had been working on, the M/V ROBERT GREENE. The Davises sought relief for personal injury and loss of consortium compensable under the general maritime laws of the United States or the Jones Act, 46 U.S.C. § 688. Mac Towing and the other defendants moved to dismiss the Davises' suit, arguing that it was barred by their earlier release.

The district court assigned the matter to a federal magistrate, who conducted a lengthy hearing at which Davis testified and was cross-examined. The magistrate concluded there was no genuine issue of fact concerning the validity of the Davises' release and recommended that their suit be dismissed. See p. 10a, *infra.* The district court then reviewed the transcript of the magistrate's hearing, as well as the transcript of the August 1984 settlement conference, and dismissed the Davises' suit by summary judgment. See p. 8a, *infra.*

The Davises appealed the dismissal to the Sixth Circuit solely on the grounds that the validity of a seaman's release must *always* be left for the jury and can never be decided by summary judgment. The Sixth Circuit did not address this issue, but nevertheless reversed and remanded.

The Sixth Circuit stated initially that because of the special solicitude for seamen required under "wards of admiralty" doctrine, as applied by this Court in *Garrett* v. *Moore-McCormack,* 317 U. S. 239, 246-48, 63 S. Ct. 246, 251-52, 87 L. Ed. 239, 244-45 (1942), a seaman's employer has the affirmative burden of proving the validity of a seaman's release. The Sixth Circuit then held that in view of the "wards of admiralty" doctrine, genuine issues still remained about the validity of Davis's release. The Sixth Circuit focused specifically on an affidavit Davis had submitted to the district court attesting that the release was not valid:

> Davis said he was informed "that counsel would not be necessary to settle this type of claim"; that he did not have the information necessary to determine that the $7,500 was grossly inadequate; that his lack of understanding of the release is evidenced by his subsequently having attempted to obtain workers' compensation; that he was not fully advised of his rights to recover under federal law; and that defendants' claims adjuster told him that "$7,500 was all that was available for this type of injury."

See p. 6a, *infra.*

Finally, in dictum, the Sixth Circuit went even further and stated:

> [A]s this case illustrates, when one considers the duty of the courts to jealously protect the rights of seamen, the institution of a "friendly" suit, based largely upon stipulated facts, with the seamen represented by counsel and available to testify and be questioned by the court, often will prove to be the most economical and productive method of settling these cases.

See pp. 6a-7a, *infra.* The Sixth Circuit explained: "That is the approach which appears to be gaining favor in the Fifth Circuit, where so many of the reported cases of these controversies originate." *Id.*

On August 17, 1987, Mac Towing filed a timely petition for rehearing and suggestion for rehearing en banc. In addition to the equal protection implications of the Sixth Circuit's decision, the panel had disregarded the proper standards for summary judg-

ment. *See Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986) (the "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial") (quoting Advisory Committee Note to Rule 56(e)); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, —, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986) ("the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff").

For example, the Sixth Circuit failed even to mention at least three crucial matters that had reinforced the district court's summary judgment. First, the Sixth Circuit failed to scrutinize the sworn affidavit from Davis that provided the justification for the panel's reversal. Davis's affidavit clearly shows that it was prepared by an attorney who did not even review the transcript of the August 1984 settlement conference. The affidavit contains numerous boilerplate misrepresentations about what Davis was or was not told at the conference, which are flatly contradicted by a reading of the conference transcript. *Compare* the Sixth Circuit's summary of the affidavit, p. 6a, *infra*, *with* 1984 conference excerpts quoted by the federal magistrate, pp. 12a-21a, *infra*.

Second, the Sixth Circuit also failed to mention the magistrate's hour-long evidentiary hearing. This hearing was explicitly conducted by the magistrate to explore the validity of Davis's release, under the stand-

ards this Court established in *Garrett* v. *Moore-McCormack, supra.* See pp. 10a-11a, *infra.* At the hearing, the magistrate heard testimony and cross-examination from Davis under oath, as well as from the employer's agent who had negotiated the settlement with Davis. After listening to Davis and evaluating his credibility, the magistrate recommended that the suit be dismissed, based upon extensive references to the transcript of the August 1984 settlement conference. See pp. 12a-21a, *infra.* The magistrate concluded :

> Although *defendant took great care to insure that the Davises executed the release freely, without deception or coercion, and with full understanding of their rights*—as the transcript of the settlement conference clearly reflects—plaintiffs argue that an issue of fact exists. I cannot agree.
>
> . . .
>
> Davis now believes that his injury was worth more than the amount he received from defendants, but that belief does not permit the court to void the agreement, particularly where *the record of the settlement conference demonstrates that the Davises executed the release freely and knowingly,* with a full understanding of their rights and the consequences of settlement.

See pp. 11a-12a, *infra* (emphasis added).

Third, the Sixth Circuit also gave short shrift to the district judge's careful consideration of the issues before him. Having had extensive experience as a trial judge (as well as previous exposure to the conduct of Mac Towing's counsel), Judge Bertelsman held:

> The court has again thoroughly reviewed the record and the memoranda of the parties. After careful consideration, the court is of the opinion that the release herein must be upheld. *If the release were not upheld, after the careful procedures followed by the defendant in taking it, there would be no situation in which a seaman's release would have any validity.* This would impede the salutary public policy of encouraging the settlement of disputes. *It is hard to see what else the defendant could have done in settling this dispute and taking a release, unless it required the plaintiff to file suit so that the settlement approval of a court could be obtained.* This would be uneconomical and counterproductive.

See p. 8a, *infra* (emphasis added).

Mac Towing's petition for rehearing and rehearing en banc raised these matters supporting the district court's summary judgment, and also raised the equal protection arguments presented by this petition. On October 5, 1987, Mac Towing's petition for rehearing or rehearing en banc was denied by the Sixth Circuit, which noted on a form order that "the issues raised in the petition were fully considered upon the original submission and decision of the case." See p. 1a, *infra*.

REASONS FOR GRANTING THE WRIT

I. Summary

The most serious problems with the Sixth Circuit's decision stem from its reliance on the ancient doctrine that seamen are "wards of admiralty" deserving special judicial protection. This doctrine is an historic anachronism and no longer bears any "rational relationship" to "a legitimate state interest." *City of Cleburne, Texas* v. *Cleburne Living Center,* 473 U. S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985); *Metropolitan Life Insurance Co.* v. *Ward,* 470 U. S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985).

There is no longer any statutory or public policy that can justify treating Jones Act seaman differently from all other workers trying to have settlement releases set aside under federal law. The Jones Act explicitly incorporates the statutory rights created under the FELA, and this Court has made it clear that an FELA claimant is required to carry the burden of proving his release was invalid. *See Callen* v. *Pennsylvania Railroad Co.,* 332 U. S. 625, 630, 68 S. Ct. 296, 298, 92 L. Ed. 242, 246 (1948):

> [U]ntil the Congress changes the statutory [FELA] plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

Indeed, bv virtue of expansive Jones Act interpretations, there is no longer any rational distinction between today's seamen and other American workers. Today's "seamen" include bartenders, engineers, firefighters, hairdressers, telephone operators and laundresses. M. Norris, 1 *The Law of Seamen,* § 2:3 (collecting cases).

Finally, even if the "wards of admiralty" doctrine is somehow defensible, the Sixth Circuit's decision additionally fails constitutional scrutiny by appearing to insist on the institution of "friendly suits" to validate seamen's releases. This requirement bears no rational relationship to the protection of seamen. The decision will only cause inflated litigation expenses for employers, while forcing scores or perhaps hundreds of claimants every year to hire attorneys and pursue time-consuming lawsuits. In fact, the Sixth Circuit's decision will apparently create a conflict with the practices in the Fifth Circuit. There, because such suits are recognized to be a masquerade of adversary litigation, the Fifth Circuit has expressly declined to require "friendly suits," *Bass* v. *Phoenix Seadrill/78, Ltd.,* 749 F. 2d 1154 (5th Cir. 1985), and the Eastern District of Louisiana has actually *forbidden* them. E. D. La. Local Rule 9.9a.

II. No "Legitimate State Interest" Is Served By Giving Seamen's Releases Stricter Judicial Scrutiny Than Releases Executed By Other American Workers.

The Sixth Circuit's decision created two classes of workers under identical federal statutes: employees

who work on vessels and thus can easily escape settlement agreements with their employers, and other employees who work on railways and are bound to their releases unless they can prove the releases are invalid. This classification is inequitable for the employers of seamen, and cannot survive the equal protection mandate contained in the Fifth Amendment's Due Process Clause. *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 638 n.2 (1975); *Bolling* v. *Sharpe,* 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). That equal protection mandate "is essentially a direction that all persons similarly situated should be treated alike. *Plyler* v. *Doe,* 457 U. S. 202, 216 (1982)." *City of Cleburne, Texas* v. *Cleburne Living Center,* 473 U. S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (where a governmental action has a "social or economic" purpose, the action can only be sustained "if the classification drawn by the statute is rationally related to a legitimate state interest").

A. The "Wards of Admiralty" Doctrine Belongs To a Bygone Era.

The Sixth Circuit's classification rested upon the Supreme Court's holding in *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239 (1942), which itself reached back to a decision written in 1823 by (Circuit) Justice Story, *Harden* v. *Gordon,* 11 F. Cas. 480 (C.C. Me. 1823) (No. 6047). In that decision, Justice Story held that a shipowner could not subtract from a seaman's wages the expenses of providing medical care during a voyage.

Justice Story's decision was expressly intended to address conditions that no longer exist. In Justice Story's time, seamen were invariably poor and uneducated men who were impressed into service for months at a time in deplorable conditions. Justice Story's ruling thus was prompted by humanitarian, if uncomfortably paternalistic, concerns:

> [E]very court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; because they are easily overreached. . . .
>
> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.

11 F. Cas. at 483, 485.

Similar pronouncements were common in that era. *See generally, Hume* v. *Moore-McCormack Lines, Inc.*, 121 F. 2d 336 (2d Cir.), *cert. denied*, 314 U. S. 684 (1941) (Frank, J.). In 1839, for example, a federal judge held that a seaman who had given his employer a receipt at the time of his disembarking could still sue for his wages. Again justifying special treatment of seamen with paternalistic excess, the Court stated:

> It is particularly fit that [a court of admiralty] should be free from the artificial and technical rules of the common law in dealing with contracts between seamen and shipowners. They are parties who do not stand in making their contracts, on even ground. Merchants are shrewd, careful, familiar with the forms of business, watchful and far-sighted in providing for their own interest; while seamen are ignorant, improvident, and necessitous, a most useful and necessary class of persons to a maritime and commercial people both in peace and war, gallant and fearless of personal danger but wholly unable to defend their rights against the superior knowledge, sagacity, and wealth of their employers.

The David Pratt, 7 F. Cas. 22, 24 (D. Me. 1839) (No. 3597).

The danger in such classifications, however, is that they can also be manipulated to allow exploitation of the class of people being "protected." For example, in *Robertson* v. *Baldwin,* 165 U. S. 275, 17 S. Ct. 326, 41 L. Ed. 715 (1897), the Court invoked the "wards of admiralty" doctrine to hold that state officers could arrest and redeliver deserting seamen to their privately-owned vessels, despite protests that this constituted involuntary servitude in violation of the Thirteenth Amendment. The Court frankly acknowledged its concern that "the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment." 165 U. S. at 283. The Court thus drew on

Justice Story's earlier decision that seamen's contracts were not governed by ordinary principles of law:

> Indeed, seamen are treated by Congress, as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians: *Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.* ["Just as a father to his children, a leader to his disciples, a master to his servants or family members."] The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

Id., at 287.

In dissent from the *Robertson* decision, Justice Harlan took aim directly at the dangers inherent in the judiciary's special treatment of seamen. Noting the origins of the "wards of admiralty" doctrine in Justice Story's earlier decision, Justice Harlan admonished:

> In view of these principles, I am unable to understand how the necessity for the *protection* of seamen against those who take advantage of them can be made the basis of legislation compelling them, against their will and by force, to render a personal service for others engaged in private business. Their supposed helpless condition is thus made the excuse for imposing upon them burdens that could not be imposed upon other classes without depriving them of rights that in-

> here in personal freedom. *The Constitution furnishes no authority for any such distinction between classes of persons in this country.*

Id., at 299 (emphasis in third sentence added).

Justice Harlan's dissent is particularly noteworthy because it so closely paralleled his dissent in a case issued seven months before, *Plessy* v. *Ferguson,* 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). There, the majority had similarly held that "equal, but separate" accommodations for white and black persons on railroads did not violate either the Thirteenth or Fourteenth Amendments. Again in dissent, Justice Harlan sharply criticized the dangers inherent in the Court's classification:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. *In respect of civil rights, all citizens are equal before the law.*

163 U.S. at 559 (emphasis added).

B. There Is No Modern Justification For Impairing The Presumptive Validity of a Worker's Release Simply Because the Worker Qualifies as a Seaman Under the Jones Act.

In the last generation, American jurisprudence has abandoned many of the artificial classifications among citizens adopted by earlier jurists. The "equal, but separate" racism in *Plessy* has been abolished as an official policy of our government. Similarly, the 19th

century sexism that justified denying married women of their capacity to contract has likewise been outlawed. *See generally City of Cleburne, Texas* v. *Cleburne Living Center,* 473 U. S. at 411, 105 S. Ct. at 3255, 87 L. Ed. 2d at 321 (1985) ("statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest").

But the distinction that produced the evil results in *Robertson* v. *Baldwin* still remains frozen in American law. In 1942, this Court in *Garrett* v. *Moore-McCormack,* 317 U. S. 239, reaffirmed the "wards of admiralty" doctrine in holding that employers of seamen must bear the burden of proving the validity of releases obtained in connection with settlements. Yet today's seamen are not, as Justice Story wrote, "credulous and complying" because "they are generally poor and friendless, and acquire habits of gross indulgence, carelessness and improvidence." 11 F. Cas. at 483, 485. On the contrary, here the protected worker at the time of the settlement was a 38 year-old high school graduate, who lived at home with his wife and child, and was fully able to make decisions about his own legal and financial needs.[1]

---

[1]By contrast to Davis, the judiciary's solicitude offers no protection to *widows* of seamen who seek to avoid their releases, because these claimants do not qualify as "wards of admiralty." *See Lampsis Navigation Ltd.* v. *Ortiz De Cortes,* 694 F. 2d 934, 938

(Footnote Continued on Next Page)

Like the respondent George Davis, today's seamen bear no resemblance to the helpless seamen of Justice Story's era. Indeed, the Sixth Circuit classification is especially capricious in view of the broad interpretations that have been given the Jones Act. The Jones Act applies to "all those on board whose labor contributes to the accomplishment of the main object in which the vessel is engaged." *Osland* v. *Star Fish & Oyster Co.,* 107 F. 2d 113 (5th Cir. 1939). As a result, the "wards of admiralty" doctrine now protects bartenders, fishermen, hairdressers, horsemen, divers, engineers, porters, telephone operators and laundresses. *See generally,* M. Norris, 1 *The Law of Seamen,* § 2:3, at 38-42 (collecting cases).

Plainly, special protection of barbers, engineers, firemen, telephone operators and laundresses, simply because they happen to work on vessels instead of railways, does not serve any "legitimate state purpose." *See Metropolitan Life Insurance Co.* v. *Ward,* 470 U. S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985) (striking down Alabama statute as violating equal protection principles because special protection for domestic businesses was not "a legitimate state purpose"). Rather, Jones Act claimants must be treated like

---

(Footnote Continued From Preceding Page)

(2d Cir. 1982) (Ward, D.J., dissenting) (questioning the majority's refusal to extend the "wards of admiralty" doctrine where a $30,000 wrongful death settlement was executed by "an unsophisticated widow who, at the time the release was signed, had suffered the sudden loss of her husband, was responsible for the welfare of her seven children, and presumably knew nothing of legal or business negotiations or transactions").

FELA claimants and all other employees seeking relief under federal law. Barring any express congressional enactment to the contrary, Jones Act claimants who seek to have settlements set aside should bear the burden of proving the invalidity of their releases.

III. Even If The State Does Have A Legitimate Interest In Giving Special Protection To Seamen, There Is No "Rational Relationship" Between That Interest And Requiring "Friendly Suits" To Be Instituted To Resolve Seamen's Claims.

The Sixth Circuit's decision must also be vacated because the "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Texas, supra,* 473 U. S. at 446, 105 S. Ct. at 3258, 87 L. Ed. 2d at 324 (citations omitted). Here, the Sixth Circuit's suggestion that "friendly suits" should be brought to validate seamen's settlements is arbitrary and irrational. The Sixth Circuit's decision will only prevent seamen from obtaining prompt resolution of their claims, while burdening state and federal courts with artificial lawsuits lacking genuine controversy.

The Sixth Circuit recommended a process where "friendly suits" are filed with "stipulated facts" in order to eliminate controversy. At the outset, this process will increase the cost of all maritime settlements for employers, if only because every settlement will now involve litigation expenses and the need to compensate claimant's counsel. Meanwhile, although a

few claimants may recover higher settlements, the great majority of claimants will only be delayed in receiving their recoveries and will suffer extensively because of strained personal finances or unmet health needs. Other claimants will be hurt even worse and will recover nothing because of unsuccessful litigation. *See Borne* v. *A & P Boat Rentals No. 4, Inc.*, 780 F. 2d 1254, 1257 (5th Cir. 1986) ("If employers are denied any degree of confidence in the finality of a settlement, seamen will lose the option to settle since employers will have little incentive to avoid a full-scale trial on the merits. Denying seamen that option is no kindness").

Indeed, the only real beneficiary of the Sixth Circuit's decision will be the plaintiff's bar, because they will now be assured of recovering one-quarter to one-third of virtually all seamen's settlements.[2] Nevertheless, the Sixth Circuit defended its suggestion with the observation that "the institution of a 'friendly suit' . . . is the approach which appears to be gaining favor in the Fifth Circuit, where so many of the reported cases of these controversies originate." See pp. 6a-7a, *infra*. Frankly, however, counsel has been unable to

---

[2]Because "friendly" seamen's suits are a windfall for the plaintiff's bar, it is unlikely that any seaman will ever find counsel to challenge the Sixth Circuit's decision, notwithstanding the harms it will cause seamen. This petition may thus present the only opportunity for the Court to consider such objections. *Compare Barrows* v. *Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) (allowing Caucasians standing to protect the constitutional rights of blacks in circumstances where "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court").

retrace the Sixth Circuit's research. The only Fifth Circuit cases that have recently mentioned friendly suits appear to be *Bass* v. *Phoenix Seadrill/78, Ltd.*, 749 F. 2d 1154, 1161 (5th Cir. 1985), and *Wink* v. *Rowan Drilling Co.*, 611 F. 2d 98 (5th Cir.), *cert. denied*, 449 U. S. 823 (1980). In *Bass*, the Court expressly declined to require judicial approval of seamen's settlements. In *Wink*, the Court decided to allow relitigation of claims previously settled "in a 'friendly Jones Act suit' " because of "the possibility that the court merely rubber-stamped the parties' extrajudicial agreement."

In fact, rather than bringing the Sixth Circuit into harmony with the Fifth, the Sixth Circuit's decision here apparently creates a conflict between federal jurisdictions. One of the busiest maritime jurisdictions in the United States, the Eastern District of Louisiana, expressly *prohibits* suits for the approval of seamen's settlements "based upon a joint stipulation and compromise which has been agreed upon by the parties prior to the filing of a complaint." Local Rule 9.9a. As the Fifth Circuit's *Wink* case, *supra*, illustrates, if courts want to prevent any possibility of overreaching, they cannot permit "friendly lawsuits" that lack genuine adversariness. Otherwise, the courts will continually be required to reexamine those judgments because they were simply "rubber-stamped." 611 F. 2d at 101.

As this Court recognized in *Callen* v. *Pennsylvania Railroad Co.*, 332 U. S. 625, 630, 68 S. Ct. 296, 289,

92 L. Ed. 242, 246 (1948), Congress and not the judiciary should resolve these conflicting public policies and decide whether to require court approval of seamen's settlements. In other contexts where Congress has considered it appropriate, Congress has not hesitated to have courts review settlements. *Compare* Fed. R. Civ. P. 23, 23.1 (requiring court approval of settlements of class action and derivative suits). But Congress has never required that seamen's settlements receive court approval. *Bass* v. *Phoenix Seadrill/78, Ltd., supra; The S. S. Standard,* 103 F. 2d 437, 439 (2d Cir.), *cert. denied,* 308 U. S. 560 (1939) ("Fair settlements are in the interest of the men, as well as of the employers. This conclusion is substantiated by the fact that Congress when it legislated as to one form of releases, namely, those for wages, nevertheless did so on the basis that the release was good until set aside").

In sum, there is no rational relationship between benefitting seamen and requiring "friendly suits" to validate their settlements. The courts should leave it to seamen to decide for themselves whether they wish to retain counsel and file suit. Employers already have strong incentives to act prudently in order to protect settlements from unraveling and prevent the kind of litigation this case presents. Unfortunately, however, the Sixth Circuit has now effectively legislated "friendly suits" for that jurisdiction, without argument by the parties or any amici curiae. The Sixth Circuit's decision must be vacated.

CONCLUSION

For at least forty years, since this Court's decision in *Callen* v. *Pennsylvania Railroad Co.*, 332 U. S. 625 (1948), an indefensible anomaly has existed in American law. Workers employed on railways have the burden of proof in setting aside settlement releases, while workers employed on vessels can ignore their releases and bring suits based on boilerplate disclaimers.

This anomaly is absolutely contrary to modern equal protection principles. It deserves the same repudiation as the 19th century's "equal, but separate" treatment of blacks, and denial of married women's rights. In Justice Harlan's words, "The Constitution furnishes no authority for such distinction between classes of people in this country." *Robertson* v. *Baldwin*, 165 U. S. 299 (dissenting).

Finally, this Court should also reverse the Sixth Circuit's ruling that a "genuine issue of fact" existed about the validity of respondents' releases. As the district court emphasized, "If [this] release [is] not upheld, after the careful procedures followed by the defendant in taking it, there would be no situation in which a seaman's release would have any validity." See p. 8a, *infra*.

Respectfully submitted,

BROWN, TODD & HEYBURN
JOHN R. MCCALL
1600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5400

Counsel of Record
for Petitioners

AND

BROWN, TODD & HEYBURN
DAVID TACHAU
SCOTT T. DICKENS
1600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5400

Counsel for Petitioners

December 31, 1987.

APPENDIX

APPENDIX

No. 86-5682

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE A. DAVIS and
RUTH DAVIS - - - - *Plaintiffs-Appellants,*

v.

AMERICAN COMMERCIAL BARGE,
INC., Et Al. - - - - *Defendants-Appellees*

ORDER—Filed October 5, 1987

BEFORE: JONES and NORRIS, Circuit Judges, and COOK* United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John Hehman
John P. Hehman, Clerk

---

*Hon. Julian A. Cook, Jr. sitting by designation from the Eastern District of Michigan

No. 86-5682

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE A. and RUTH DAVIS - - *Plaintiffs-Appellants,*

v.

AMERICAN COMMERCIAL LINES, INC.; MAC TOWING, INC.; M/V "ROBERT GREENE," - - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky
Decided and Filed July 24, 1987.

Before JONES and NORRIS, Circuit Judges, and COOK, District Judge.*

ALAN E. NORRIS, Circuit Judge.

George A. Davis, a seaman, and Ruth Davis, his wife, appeal from the summary judgment granted to defendants in the Davises' suit for injuries, maintenance, cure, and loss of consortium. Summary judgment was based upon plaintiffs having given a release to defendants in exchange for payment of $7,500. Plaintiffs maintain that the district court erred in determining that there was no genuine issue of material fact as to the validity of the release since they were not represented by counsel when the settlement was

---

*Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

consummated, were unaware of the contents of several medical reports, did not have full understanding of the rights relinquished by the release, and the consideration was inadequate on its face.

George Davis was hired as a seaman, in September 1982, to work as a deck hand and, on November 2, 1983, he injured his right wrist while attempting to secure a wire to a tow that had been picked up by the vessel on which he was working. Defendants later offered Davis and his wife $7,500 in return for their release of all claims that they might have, and, on August 8, 1984, the Davises, unaccompanied by counsel, went to the law offices of defendants' attorney for the purpose of executing a settlement and release. At the settlement conference, the attorney asked the Davises a series of questions, which addressed aspects of Davis' employment, his injury, his claim against defendants, and the terms of the release and settlement. During the course of the settlement conference, plaintiffs said they did not desire to have an attorney present to represent them, and they executed a release agreement in exchange for payment of $7,500.

On November 18, 1985, the Davises filed this action seeking compensation under "The General Maritime laws" and the Jones Act, 46 U.S.C. § 688. Defendants moved for summary judgment based on the release.

Courts of this country have long shown a special concern for the welfare of seamen; they are considered to be the "wards of admiralty" and, as such, releases signed by them are carefully scrutinized when they are set up as a defense by shipowners. *See Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 246–48 (1942). The rule is well-established:

> [T]he burden is upon one who sets up a seaman's release to show that it was executed freely, without

> deception or coercion, and that is was made by the seaman with full understanding of his rights. The adequacy of the con-ideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.

Id. at 248.

The traditional extent of the "wards of admiralty" concept is illustrated by language used by Justice Story in 1823:

> "They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trustent* with their trustees. . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen." *Harden* v. *Gordon,* Fed. Cas. No. 6047, at pp. 480, 485.

317 U.S. at 246–47.

Accordingly, in order to carry its burden of establishing the validity of a seaman's release, a shipowner must af-

firmatively show that no advantage was taken of the seaman, and that burden is particularly heavy where the consideration is inadequate. 317 U.S. at 247.

In addition to the burden ordinarily shouldered by any shipowner in establishing the validity of a seaman's release, defendants have assumed the burden imposed upon movants for summary judgment.

The question on appeal, then, is whether the district court was in the position, upon a motion for summary judgment, to conclude that there was no genuine issue of material fact concerning the validity of the release, and that, as a matter of law, defendants were entitled to judgment.

Although the magistrate, upon whose report and recommendation the district court relied, mentioned the "wards of admiralty" standard, he then went on to scrutinize the validity of the release in the context that would be expected to surround a release given as part of an ordinary arm's length business transaction. The district court, in its entry of judgment noted the "careful procedures followed by the defendant in taking" the release. Indeed, we are favored with sixty pages of meticulous questioning of Davis, undertaken by counsel for defendants to preserve a record of the settlement conference. Defendants paid only $7,500 for the release of plaintiffs' claims stemming from an injury which counsel described, in the transcript of the settlement conference, as "a permanent serious injury to your right wrist, something that is going to prevent you from doing any heavy manual labor from now on." Yet, in all the sixty pages, discussion of the adequacy of $7,500 as compensation for Davis' permanent impairment is carefully avoided. Accordingly, one might reasonably characterize the settlement conference transcript as a careful memorialization of a manifestly unfair settlement. Certainly, Davis was entitled to such a favorable construction of the event,

on summary judgment, especially when one considers the district court's responsibility to assure that the bargain was just and reasonable. The court's responsibility to apply the standard of scrutiny required of a trustee was particularly apparent in this case, in view of the inherent inequality of bargaining positions of the parties, the nominal amount of consideration paid, the nature and permanency of the injury, and Davis' age (he was born in 1945) and work skills. *See, e.g., Halliburton* v. *Ocean Drilling & Exploration,* 620 F. 2d 444 (5th Cir. 1980); *Charpentier* v. *Fluor Ocean Servs., Inc.,* 613 F. 2d 81 (5th Cir. 1980).

In his affidavit in opposition to defendants' motion for summary judgment, Davis said he was informed "that counsel would not be necessary to settle this type of claim"; that he did not have the information necessary to determine that the $7,500 was grossly inadequate; that this lack of understanding of the release is evidenced by his subsequently having attempted to obtain workers' compensation; that he was not fully advised of his rights to recover under federal law; and that defendants' claims adjuster told him that "$7,500 was all that was available for this type of injury."

When considered in contrast with defendants' summary judgment materials, this affidavit raised genuine issues of material fact concerning the fairness of the bargain, overreaching and misrepresentation by defendants, and the extent of Davis' understanding of his rights and of the full effect of the settlement and release.

In its judgment entry, the district court observed that seeking judicial approval of these kinds of settlements is "uneconomical and counter-productive." Actually, as this case illustrates, when one considers the duty of the courts to jealously protect the rights of seamen, the institution of a "friendly" suit, based largely upon stipulated facts, with the seaman represented by counsel and available to

testify and be questioned by the court, often will prove to be the most economical and productive method of settling these cases. That is the approach which appears to be gaining favor in the Fifth Circuit, where so many of the reported cases of these controversies originate.

The judgment of the district court is reversed and this cause is remanded for further proceedings according to law and consistent with this opinion.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

Civil Action No. 85-273

GEORGE A. DAVIS, Et Al. - - - - *Plaintiffs*

v.

AMERICAN COMMERCIAL LINES, INC., Et Al. - *Defendants*

JUDGMENT—Filed May 22, 1986

This matter is before the court on plaintiffs' objections to the Report and Recommendation of the United States Magistrate, Honorable Joseph M. Hood, recommending that defendants' motion for summary judgment on the basis of release be granted and the complaint dismissed. The court was thoroughly familiar with the record, but referred it to the Magistrate to obtain his independent opinion. The court has again thoroughly reviewed the record and the memoranda of the parties. After careful consideration, the court is of the opinion that the release herein must be upheld. If the release were not upheld, after the careful procedures followed by the defendant in taking it, there would be no situation in which a seaman's release would have any validity. This would impede the salutary public policy of encouraging the settlement of disputes. It is hard to see what else the defendant could have done in settling this dispute and taking a release, unless it required the plaintiff to file suit so that the settlement approval of a court could be obtained. This would be uneconomical and counterproductive.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the objections to the Report and Recommendation of the Magistrate be, and they are, hereby OVERRULED;

2. That the Report and Recommendation of the Magistrate be, and it is, hereby adopted as the findings of fact, conclusions of law, and opinion of the court, except as to the matter of costs;

3. That the motion of the defendants for summary judgment be, and it is, hereby GRANTED;

4. That the complaint herein be, and it is, hereby DISMISSED, with prejudice;

5. That the defendant shall recover its costs herein expended, no reason appearing why the defendant should not recover its reasonable costs as the prevailing party;

6. That the defendants' motion for attorney's fees, pursuant F.R.Civ.P. 11, be, and it is, hereby DENIED, for the reasons stated in the Report and Recommendation of the Magistrate.

This 22nd day of May, 1986.

(s) William O. Bertelsman
Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 85-273

GEORGE A. DAVIS and
RUTH DAVIS - - - - - - - - *Plaintiffs*

v.

AMERICAN COMMERCIAL LINES, INC., Et Al. - *Defendants*

MAGISTRATE'S REPORT AND RECOMMENDATION

Filed April 7, 1986

George A. Davis (Davis) was employed by Mac Towing, Inc. (Mac Towing). On November 2, 1983, while working as a seaman on board the M/V ROBERT GREENE, a towboat owned and operated by American Commercial Lines, Inc. (American Commercial), Davis allegedly injured his wrist. On July 12, 1984, Davis' physician reported that his patient had obtained "maximum cure" for his wrist injury.

Davis and his wife filed this action on November 18, 1985. They seek, jointly and individually, the sum of $150,000 under the Jones Act, 46 U.S.C. Section 688, maintenance and cure under the law of admiralty, and interest on the judgment. Defendants seek summary judgment by virtue of a written release agreement executed by plaintiffs on August 8, 1984. Record No. 2, Exhibit A. The matter has been referred to the undersigned for a report and recommendation on the motion *sub judice*. 28 U.S.C. Section 636(b)(1)(B).

Seamen, like Davis, are wards of admiralty whose rights must be jealously protected by the federal courts. *Bass* v.

Phoenix Seadrill/78, Ltd., 749 F. 2d 1154, 1160-1161 (5th Cir. 1985). The federal courts are duty-bound to carefully scrutinize releases on settlements involving a seaman's rights. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 248 (1942); *Wink* v. *Rowan Drilling Co.*, 611 F. 2d 98, 100 (5th Cir.), *cert. denied*, 449 U.S. 823 (1980).

> We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing his release are relevant to an appraisal of this understanding.

Garrett, 317 U.S. at 248.

Over a two day period, July 25-July 26, 1984, Davis, his wife and Michael Petty, a claims representative of Mac Towing, engaged in settlement negotiations. The Davises orally agreed to accept $7,500 in return for their release of all claims that they may have against the defendants in this case. The parties agreed to meet in Louisville, Kentucky, to finalize the settlement.

On August 8, 1984, two weeks later, the Davises came to the law offices of John R. McCall (McCall), attorney for Mac Towing. After the Davises had been duly sworn, McCall asked them a series of questions designed to satisfy the *Garrett* requirements. At the conclusion of the conference, which lasted one hour and twenty minutes, knowing full well that Davis could no longer perform heavy manual labor the Davises executed a release agreement in exchange for payment of the lump sum of $7,500. Record No. 2, Exhibit B.

Although defendants took great care to insure that the Davises executed the release freely, without deception or

coercion, and with full understanding of their rights—as the transcript of the settlement conference clearly reflects —plaintiffs argue that an issue of fact exists. I cannot agree.

Plaintiffs argument is premised on Davis' belief that he could still recover Workers' Compensation Benefits through the Industrial Commission of Ohio even though he settled his Jones Act claim. This belief was, however, erroneous inasmuch as such benefits are not available under Ohio law to seamen covered by the Jones Act and admiralty law. Record No. 8. Regardless of whether Davis settled with defendants, he could not have obtained workers' compensation benefits.

Davis now believes that his injury was worth more than the amount he received from defendants, but that belief does not permit the court to void the agreement, particularly where the record of the settlement conference demonstrates that the Davises executed the release freely and knowingly, with a full understanding of their rights and the consequence of settlement. *Bass,* 749 F. 2d at 1162-1163. This conclusion is supported by the following lengthy excerpt from the transcript of the settlement conference:

A. No.

Q. Let's take a moment again now and take a break for just a moment and give you a chance to read through the document that's in front of you that's entitled release agreement which is a four-page document. Would you take a moment, please, sir, and read that. And, Miss Davis, if you have not finished reading it, would you also please read it?

Mrs. Davis: Okay.

A. (Examining document) Okay.

Q. Now, Mr. Davis, have you carefully read that four-page document or would you like to take more time to read it now?

A. No. I understand it.

Q. I'm going to go through it paragraph by paragraph and discuss each of the paragraphs. But do you have any questions before we go through that that you would like for me to answer with respect to this document?

A. No.

Q. Mrs. Davis, do you have any questions that you would like to ask?

Mrs. Davis: None at all.

Q. Now, this is a release agreement which we will be asking you to sign in a few minutes. And in exchange for signing this release agreement, we will deliver to you a check for $7,500. The document provides for both you and Mrs. Davis to sign the release agreement, because there are potential claims that both of you might have against MAC Towing, Inc. Do you understand that?

A. Right.

Q. Do you understand that, Mrs. Davis?

Mrs. Davis: Un-huh.

Q. Now, the second paragraph provides as we've already discussed that you will be receiving a check in the amount of $7,500 in exchange for—which you will be releasing forever. And that means from now on MAC Towing, Inc., your employer, American Commercial Lines, Inc., its parent company, and all other companies that are in any way related to those two companies, like, American Commercial Barge Lines, Louisiana Dock Company, or any other company that's related and any of their employees, any of their officers, any one else. Do you understand that?

A. Yes.

Q. Is that understood, Mrs. Davis?

Mrs. Davis: Un-huh.

Q. Now, in the paragraph that begins at the bottom of the page it states that from any medical expenses for any reason whether related to your wrist or any other problem that occurs after August 8, 1984, that you will be responsible for that medical payment; is that understood?

A. Yeah.

Q. And it goes on to say that you will indemnify and save harmless—

Mrs. Davis: (Interrupting) Uh-huh.

Q. (Continuing)—these companies for those claims and that means that if a doctor treats you after August 8, 1984, and sends a bill to MAC Towing, Inc., that you're going to be responsible for it. They're not going to pay it. And you'll be sure that they don't get in trouble for not paying it; is that understood?

A. Right.

Mrs. Davis: Un-huh.

Q. In the next full paragraph or Page 2 is the paragraph that relates to the relinquishment of employment. Now, we know that that means that you are by agreement saying that after—as of August 8, 1984, you are no longer an employee of MAC Towing Company, Inc., and have no rights or claims related to employment against MAC Towing, Inc., or any of these other companies after that date; is that understood?

A. Yes.

Q. And you know that that means that after that date you have no benefits available to you or to your family in relation to employment rights and employment benefits; is that understood by both of you?

Mrs. Davis: Yeah.

Q. Mr. Davis?

A. Yes.

Q. That also means that after you sign this document, there will be no more claims for maintenance and cure against MAC Towing, Inc., or any of its affiliated companies; is that understood?

A. Yes.

Q. It means that there will be no further claims for any kind of pension benefits or anything of that nature; is that understood?

A. Yes.

Q. Also, Mrs. Davis?

Mrs. Davis: Un-huh.

Q. You understand that after August 8, 1984, that once you sign this document, you have no insurance benefits; is that understood?

A. Yes.

Mrs. Davis: Yes.

Q. Now, in the next paragraph on Page 2 there is a declaration about your understanding of the nature of your injuries, that you understand that they are permanent or certainly may be permanent and probably are permanent. And progressed means that they could get worse and make it worse; do you understand that?

A. Yes.

Q. It also goes on to say that those—you've seen four or five different doctors now, that there may be things in your wrist that are wrong that those doctors didn't find or there may be things wrong in your arm that the doctors didn't find and that there may be medical conditions present in your arm or wrist or in your hand that you don't know about because nobody's found them yet. But you're still saying even if there's something wrong with me related to this injury that nobody's told me about yet, I'm still

giving up any claims I might have in exchange for receiving this money; is that understood?

A. Yes.

Q. Mrs. Davis?

Mrs. Davis: Yes, un-huh.

Q. Now, in deciding to go forward with this release that you and Mr. Petty have been negotiating and discussing, you're relying solely on your judgment that this is the right thing to do; is that correct?

A. Right.

Q. Is that correct, Mrs. Davis?

Mrs. Davis: Yes.

Q. In other words, you're not relying on Mr. Petty's judgment. You're not relying on my judgment. You're not relying on anyone else's judgment other than your own; is that correct?

A. Yes.

Mrs. Davis: Right.

Q. Have any promises of any kind been made to you by anyone relating to your release of this claim other than what's stated in this document?

A. No.

Mrs. Davis: No.

Q. Now, do you understand that if you do not sign this release agreement and if you refuse to go forward with this settlement, that you can hire a lawyer and file a lawsuit against your employer; do you understand that you have that right?

A. Yes.

Q. Mrs. Davis?

Mrs. Davis: Un-huh.

Q. And that if you were to file a lawsuit, you could make a claim under the Jones Act which is a federal law

regarding the rights of seamen to seek, make claims against their employers when they're injured while serving aboard a vessel on the waterways of the United States; you understand that you have that right?

A. Right.

Mrs. Davis: Un-huh.

Q. And you also understand that claim, if pressed, would be a claim based on some act of negligence on the part—on the part of your employer, on the owner of the boat, or the operator of the boat; is that understood?

A. Yes.

Q. Do you also understand that you have a right to make a claim for the unseaworthiness of the boat or the barges? And by that I'm not saying what the relation of such a claim might be, but that you would have a right to make the claim for unseaworthiness; do you understand that?

A. Un-huh, yes.

Mrs. Davis: Yes.

Q. In addition, you have a right to make a claim for maintenance and cure which is the maintenance payments that we've already talked about, the medical payments that we've talked about; do you understand that you have that right?

A. Right.

Q. Mrs. Davis?

Mrs. Davis: Yes.

Q. Mrs. Davis, you might also have a right to make a claim for loss of consortion or consortium which means a loss of your husband's companionship or society at some point during the course of this injury; do you understand that you have that right?

Mrs. Davis: Yes.

Q. Do you understand that also, Mr. Davis?

A. Right.

Q. Now, in spite of the fact that you have all of those rights and could make all of those claims if you chose to do so, you still at this point in time its your choice not to go out and see at attorney; is that correct?

Mrs. Davis: Un-huh.

Q. Mr. Davis?

A. Right.

Q. Further, do you understand that by entering into this release agreement, MAC Towing, Inc., American Commercial Lines, Inc., or any of the affiliated companies and all of its employees are not admitting liability for or responsibility for your injury; is that understood?

A. Yes.

Q. Is there anything at all about your current circumstance at home or in any other situation that is forcing you to enter into a settlement agreement that really you don't want to enter into or you think is not in your best interest?

A. Yes.

Mr. Davis: No.

Q. Are either of you currently on any kind of drugs that would in any way affect your ability to read or understand what we've been dealing with today?

Mrs. Davis: No.

A. No.

Q. You're not on any kind of medication?

A. No.

Q. Neither of you have consumed any alcoholic beverages before coming in here today; is that correct?

A. No.

Mrs. Davis: No.

Q. Am I correct that you have not done so?

Mrs. Davis: Yeah, you're correct.

Q. And for the record, how old are you, Mr. Davis?

A. Thirty-eight.

Q. How old are you, Mrs. Davis?

Mrs. Davis: Thirty-one.

Q. If you were to file a claim for any of these rights that I have listed, go out and hire a lawyer and file a claim, do you understand that you would have a chance of getting more money than you're getting in this settlement?

A. Yes.

Mrs. Davis: Yeah.

Q. And do you understand you have a chance or risk of getting less money than you're getting in this settlement?

A. Yeah.

Mrs. Davis: Yeah.

Q. Now, having gone through this document and talked about it some, do either of you have any questions at all about the release agreement or about any aspect of the settlement or about any of your rights once you've signed this document?

A. No. I basically understand it.

Q. Would the two of you like to—for us to leave the room and give you a chance to talk this over further before we go forward with signing it?

Mrs. Davis: We already talked it over, really. So we kind of—we kind of knew what was to be expected anyway.

A. Right.

Q. Again, I may repeat, if you would like to have some time to talk it over, we would certainly like to give you that opportunity.

A. No. I'm all right.

Q. Okay.

Mrs. Davis: Yeah.

Q. What I would like for the three of you to do at this time then is to take the original of this document which I have here and I would like for you both to initial each page of the document at the bottom and to sign the document on the last page. And I will ask Mr. Petty and Mr. Ash if they will serve as witnesses to your signatures on this document. Would you please do that?

Mrs. Davis: Yeah.

Q. Put your initials down at the bottom of Pages 1, 2, and 3. And on Page 4 if you would sign above your name on the line above your name.

(WHEREUPON, AT THIS POINT THE RELEASE AGREEMENT WAS INITIALED AND SIGNED BY MR. AND MRS. DAVIS)

Q. Mrs. Davis, would you in that blank there at the top of that page where it says August blank, 1984, would you write in the eighth there, just write eight.

Now, I would like for you to do something else for me. On the third page—let me look at your copy just a moment. Down at the bottom in Paragraph 4, last line on Page 3 it says 'we have carefully read this agreement'. Mrs. Davis, would you please underline that portion that says 'we have carefully read this agreement' and would you please initial —put your initials by that if, in fact, that is a true statement? You see where I'm talking about, the bottom of Page 3?

Mrs. Davis: Oh, okay.

Q. Just draw a line under that part 'we have carefully read this agreement'. Would you put your initials after that?

(WHEREUPON, AT THIS POINT MRS. DAVIS UNDERLINED AND INITIALED THE LAST LINE ON PAGE 3 OF THE RELEASE AGREEMENT)

Q. And then again, Mr. Davis, if in fact you have carefully read that document, would you please put your initials after that statement?

(WHEREUPON, AT THIS POINT MR. DAVIS UNDERLINED AND INITIALED THE LAST LINE ON PAGE 3 OF THE RELEASE AGREEMENT)

Q. Thank you, sir. Now, would you please do that again, both of you, to this copy. And let me have that copy. And I'm going to change my earlier instructions. And I'm going to ask the Court Reporter if she'll serve as a witness and ask my associate, [M]r. Tachau, if he'll serve as a witness on this document.

A. Just initial it?

Q. Just initial it and sign it in the same way that you did the other copy.

(WHEREUPON, AT THIS POINT MR. AND MRS. DAVIS SIGNED, UNDERLINED AND INITIALED A COPY OF THE RELEASE AGREEMENT WHILE THE COURT REPORTER AND MR. TACHAU WITNESSED THE ORIGINAL AND COPY OF THE RELEASE AGREEMENT)

Record No. 2, Exhibit B, pp. 45-58.

Defendants have also moved the court for an order awarding them their costs and reasonable attorneys' fees pursuant to Rule 11, Fed.R.Civ.P. However, even though the release and the transcript of the settlement conference clearly demonstrate that defendants are entitled to judgment on their defense, it is suggested that plaintiffs were entitled to have the court make that determination. Indeed, it is not uncommon, and perhaps a sound practice,

to file a friendly Jones Act suit to obtain judicial approval of a seaman's release. *Bass,* 749 F. 2d at 1161 n. 12.

Accordingly, it is recommended that: (1) defendants' motion for summary judgment on the question as to the validity of Davises' release be granted; (2) defendants' motion for an order awarding them their costs and reasonable attorneys' fees be denied; and (3) this cause be dismissed.

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas* v. *Arn,* 728 F. 2d 813 (6th Cir. 1984), *aff'd,* ___ U. S. ___, 38 Cr L 3031 (December 4, 1985); Rule 72(b), Fed.R.Civ.P.

This the 4th day of April, 1986.

(s) Joseph M. Hood
Joseph M. Hood
United States Magistrate